92-657

No. _____

Supreme Court, U.S.
FILED
OCT 13 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October 1992 Term

PETITION FOR WRIT OF CERTIORARI

PHIL KAUBLE, GERALD E. AILOR,
DONALD E. ANDERSON, et al,
Petitioners,
-v-
IN THE MATTER OF:
CONTINENTAL STEEL CORPORATION
FORMERLY KNOWN AS
PENN-DIXIE STEEL CORPORATION,
et al.
Respondents.

PETITION
FOR WRIT OF CERTIORARI TO
THE SEVENTH CIRCUIT COURT OF APPEALS

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-v-
IN THE MATTER OF:
CONTINENTAL STEEL CORPORATION
FORMERLY KNOWN AS
PENN-DIXIE STEEL CORPORATION
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Respondents.

Submitted By: _____

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QUESTION PRESENTED FOR REVIEW

This appeal addresses the question of whether or not the plan participants to a pension plan termination proceeding are entitled to actual notice of a plan termination proceeding pursuant to the plain meaning of [29 U.S.C. §1342(d)(2)(B), and;

Whether plan participants to pension plans pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), [29 U.S.C. §§1001, et seq.,], are "interested parties" with a fundamental right to be heard in proceedings to terminate pension plans pursuant to [29 U.S.C. §1342.]

LIST OF PARTIES

Pursuant to Rule 21.1(b), the parties who have appeared in this appeal case no. 91-3368 are listed below.

APPELLANTS:

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Gerald E. Ailor,
Donald E. Anderson, et al.,
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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Phil Kauble and 128 other plan participants of Pension Plan "A" of Continental Steel Corporation (hereinafter "plan participants" or "participants") pray that a Writ of Certiorari issue to review the judgment of the U.S. Seventh Circuit Court of Appeals entered in the matter of Phil Kauble, et al, Petitioners, -v- In the matter of Continental Steel Corporation, Respondent, in the bankruptcy of Continental Steel Corp., f/k/a Penn-Dixie Steel, a/k/a Penn-Dixie Industries, Inc., in the U.S. bankruptcy court for the Southern District of Indiana case no. IP85-5415-V.

OPINIONS BELOW

The Seventh Circuit Court of Appeals denied plan participants' Motion for Rehearing En Banc on August 7, 1992; reproduced in Appendix "A" hereto.

The Opinion of the Seventh Circuit is reproduced in Appendix "B" hereto.

The Opinion of the District Court is reproduced in Appendix "C" hereto.

The Opinion of the Bankruptcy Court is reproduced in Appendix "D" hereto.

JURISDICTION

The plan participants claim that the Suggestion for Rehearing En Banc made by plan participants tolled the time within which to file Petition for Writ of Certiorari. Appendix "A" at pages 39-40.

The Judgment and Opinion of the U.S. Seventh Circuit Court of Appeals was entered on July 10, 1992. The juris-

diction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

RULES INVOLVED

29 U.S.C. §1342(b)(1) provides:

(b) Appointment of trustee. (1) Whenever the corporation makes a determination under subsection (a) with respect to a plan or is required under subsection (a) to institute proceedings under this section, it may, upon notice to the plan, apply to the appropriate United States district court for the appointment of a trustee to administer the plan with respect to which the determination is made pending the issuance of a decree under subsection (c) ordering the termination of the plan. If within 3 business days after the filing of an application under this subsection, or such other period as the court may order, the administrator of the plan consents to the appointment of a trustee, or fails to show why a trustee should not be appointed, the court may grant the application and appoint a trustee to administer the plan in accordance with its terms until the corporation determines that the plan should be terminated or that termination is unnecessary. The corporation may request that it be appointed as trustee of a plan in any case.

29 U.S.C. §1342(d)(2)(B) provides:

(2) As soon as practicable after his

appointment, the trustee shall give notice to interested parties of the institution of proceedings under this title to determine whether the plan should be terminated or to terminate the plan, whichever is applicable. For purposes of this paragraph, the term "interested party" means--

(B) each participant in the plan and each beneficiary of a deceased participant, and ....

29 U.S.C. §1342(d)(3) provides in pertinent part:

(3) Except to the extent inconsistent with the provisions of this Act, or as may be otherwise ordered by the court, a trustee appointed under this section shall be subject to the same duties as those of a trustee under section 704 of title 11, United States Code [11 USCS §704], ...

29 U.S.C. §1001(b) provides:

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefits plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and other obligations for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

Rule 9010(c) of the Bankruptcy Rules of Procedure provides:

(c) Power of Attorney. The authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose other than the execution and filing of a proof of claim or the acceptance or rejection of a plan shall be evidenced by a power of attorney conforming substantially to Official Form No. 17 or Official Form No. 18.

STATEMENT OF CASE

This proceeding is a proceeding to terminate the pension plan of plan participants pursuant to 29 U.S.C. §1342 by the Pension Benefit Guaranty Corporation (hereinafter, the "PBGC"). See, generally, Order at Appendix "B", pages 43-60 (hereinafter "App. __-__"). On Feb. 14, 1986, the PBGC filed an Application to terminate Pension Plan "A" of Continental Steel Corporation in the U.S. district court for the Southern District of Indiana. Id. To notify plan participants, a copy of notice was published in

two major newspapers on Feb. 17 and 18, 1986. Id. The district court referred the case to the U.S. bankruptcy court in the Continental Steel bankruptcy where it was designated Adversary Proceeding 86-141. Id. Continental Steel was the plan administrator and employer of plan participants. Id. Continental Steel had filed for bankruptcy relief under Chapter 11 on Nov. 25, 1985, which was converted to a Chapter 7 on Feb. 25, 1986. Id.

On February 19, 1986, the United Steelworkers of America and its two Locals 1054 and 3601 (hereinafter, the "Union") moved to intervene in the proceeding as "participants" and "beneficiaries" of Pension Plan "A". This motion to intervene by the Union was never ruled on by the bankruptcy court. App. 74. In March of 1986, there was an Agreed Entry

in this proceeding between the PBGC, the Union and the Chapter 7 trustee to appoint the PBGC statutory trustee of the pension plan pursuant to 29 U.S.C. §1342 which was approved by the bankruptcy court. App. 47-48.

This matter lay dormant until motion to intervene by plan participants on Feb. 1, 1988, two years later, by participants' counsel, Hopkins & Sutter and Noel & Noel. Id. The Union objected to motion to intervene by participants' counsel on grounds that the Union is the "official bargaining agent" [as of [3/8/88] of all plan participants, and the Union had "powers of attorney" from the plan participants to represent their interests. Counsel for the Union wrote to plan participant H. Dean Bousum on May 18, 1987, to advise Bousum that the power of attorney Bousum executed had

nothing to do with the pension plan litigation. Letter of Union's counsel, Paul T. Deignan, Esq., to H. Dean Bousum is reproduced at Appendix "E" at pages 81-82, infra.

After motion to intervene by plan participants' counsel, but prior to the Union's objection, there was an agreement between PBGC, the Union and the bankruptcy trustee concerning the termination date of the pension plan in the related bankruptcy proceeding of Continental Steel, i.e., the agreement was not in the record of this adversary proceeding to terminate Pension Plan "A". On Feb. 23, 1988, these same parties proposed an agreement in the bankruptcy proceeding, retroactively setting Feb. 25, 1986 as the date of termination of Pension Plan "A". Id. On March 10, 1988, the bankruptcy court held a hearing in

the Continental bankruptcy to review and approve the proposed agreement. Id. There is nothing in the record of this proceeding to reflect that this agreement was made. In April, 1988, plan participant Phil Kauble wrote to the Hon. Richard W. Vandivier to inquire about the pension plan litigation. Judge Vandivier responded by letter dated April 25, 1988, that Kauble's inquiry had been referred to counsel for the Union for response, since counsel for the Union represented the "interests" of plan participants. Judge Vandivier's letter to Kauble is reproduced in Appendix "F" at page 83, infra.

This proceeding remained dormant for another two and a half years after objection by the Union to plan participants' motion to intervene. On November 8, 1990, counsel Mark Garringer filed an

"Appearance" for plan participants in this proceeding. App. "D", page 72, infra. The appearance referenced the 128 Powers of Attorney attached to the Appearance of Garringer in the bankruptcy proceeding executed by plan participants. Id. The Appearance attached pertinent part of the transcript of hearing held in the bankruptcy on 4/12/88 where the bankruptcy court stated that it had not authorized any counsel for plan participants in the pension litigation, and that they were free to hire counsel "as is any person". Id.

The bankruptcy court struck the appearance of Garringer from the record on grounds that the proper avenue for plan participants would be to move to intervene under Bankruptcy Rule §7024. infra, page 76. Although the case remained open, infra, page 75, the bank-

ruptcy court stated "any interest his clients had in this case has been finally adjudicated" and an intervention would be without purpose, infra, page 77.

From the final Entry of the bankruptcy court striking Garringer's appearance, plan participants appealed to the district court for review. App. "C", infra, pages 61-71. Plan participants appealed the decision of the district court affirming the bankruptcy court's Entry to the Seventh Circuit Court of Appeals. App. "B", infra, pages 41-60. The plan participants now petition for Writ of Certiorari to issue.

I. FIRST SUBSTANTIAL DEPARTURE FROM THE LAWS OF THE UNITED STATES

ACTUAL NOTICE IS NECESSARY TO FINALLY ADJUDICATE THE INTERESTS OF PLAN PARTICIPANTS

The record of this proceeding fails to reflect that the interests of plan participants has been "finally adjudicated" as asserted by the bankruptcy court. infra, at page 77. The case in point is Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (hereafter, Mullane).

It is clear that the U.S. 7th Circuit Court of Appeals has overruled the U.S. Supreme Court and the U.S. Congress in its apparent determination that "To notify participants, a copy of the Notice was published in two major newspapers" as being sufficient to adjudicate the interests of plan participants, infra, at 46-47, and generally at 45-47. This "notice by publication" was deemed insufficient in Mullane, supra, to adjudicate the interests of beneficiaries to trust termination proceedings consistent

with the Due Process clause of the Fifth Amendment of the United States Constitution. The U.S. Congress enacted a law of the United States which requires actual notice of the proceeding to be provided to plan participants by the statutory trustee promptly after appointment. 29 U.S.C. §1342(d)(2).

The PBGC failed to provide any actual notice to plan participants after its appointment as statutory trustee by the bankruptcy court as required by law. 29 U.S.C. §1342(d)(2). Notice to the plan administrator, to wit, Continental Steel, would fail, because Continental Steel ceased operations on Feb. 25, 1986 pursuant to the event of Chapter 7 and had no further relationship or communications with plan participants. Likewise, notice to the Union would fail for substantially the same reasons. 29 U.S.C.

§§1002, et seq. The plan participants would like to see a record of this proceeding which conforms to 29 U.S.C. §1342 and the laws of the United States. That is because it is their "interests" that are being litigated in the proceeding. See, App. "F", Vandiver letter to Kauble, infra, at page 83.

The plan administrator and trustee to the plan prior to termination reported a marginally underfunded pension plan with assets in excess of federally guaranteed minimums insured by the PBGC. Thus, the plan participants would receive more than the guaranteed minimum in any rational close out of the plan pursuant to 29 U.S.C. §1342(d)(3). However, the plan participants are deprived of the intent of Congress while others represent the interests of plan participants and their rights are allowed to lapse into desue-

tude and inactivity.

In PBGC v. Heppenstall (hereafter, "Heppenstall") 633 F.2d 293, 301-302 (3rd-Cir.-1980):

> Notice to participants is not treated with any kind of precision in the statute. If a trustee is appointed under section 1342(b) he has the power "to do such other acts as he deems necessary to continue operation of the plan without increasing the potential liability of [PBGC] ...." 29 U.S.C. §1342(d)(1)(A)(v). If a trustee seeks termination he must give notice to "each participant in the plan and each beneficiary of a deceased participant ...." 29 U.S.C. 1342(d)(2)(B). But when PBGC seeks termination it need only notify the plan administrator, who, as we indicated above, may consent. We suppose that it was the expectation of Congress that if a plan administrator consents to termination it will notify employees, who will thereafter have no justifiable expectation in a plan's continuation. Absent such consent, however, it seems unlikely that Congress intended to leave employees in the dark about a possible termination while they continued to work. Section 1342(c) gives them a statutory right to consideration of the protection of their interests in contested termination proceedings.

Heppenstall is generally followed by the federal courts as a "touchstone" of notice required to plan participants to establish the termination date of a plan in plan termination proceedings by the PBGC pursuant to §1342. See, generally, In re: Pension Plan for Employees of Broadway Maintenance Corp., 707 F.2d 647 (2d Cir.-1983); In re: Maryland Glass, 618 F.Supp. 1410, 1415, (D.C. Md.-1985); and Pension Commission for Farmstead v. PBGC, F.Supp. 1020, 1026-1027 (D.C. Minn.-1991.) However, plan participants suggest there is a potential for misreading Heppenstall in this case, because the employer ceased operations prior to the appointment of PBGC as statutory trustee, and although their work had ceased they had a reliance in the contract language continuing their right to accrue seniority for purposes of pen-

sions for up to two years after the plant "shutdown" (commonly called "creeping") in the absence of any notice to the contrary. In the reading of Heppenstall: if PBGC is the trustee, does not the PBGC have to give notice to plan participants since there was no "employer", "employees", "employee organization" or "employment relationship" pursuant to 29 U.S.C. §§1002, et seq., upon the appointment of PBGC as trustee of Pension Plan "A"?

Invariably, the statutory trustee appointed pursuant to §1342(b) is the PBGC. Id. The plain language and the plain meaning of §1342(d)(2)(B) is that the statutory trustee shall give notice to plan participants after appointment. In the facts of this matter, the PBGC was appointed statutory trustee on March 12, 1986. Is it too much to expect that the PBGC, as statutory

trustee, would give actual notice as required by the plain meaning of the statute in the event the "employer" ceased to exist prior to appointment of PBGC as statutory trustee? Apparently it is from the opinions of the lower courts in this matter. However, the law should be given its plain meaning. Pavlic & LeFlore v. Marvel Group, 493 U.S. 120, 123, 107 L.Ed.2d 438, 110 S.Ct. 456 (1989).

From a practical standpoint, it is tragic that the federal courts have tied the issue of notice to participants to the issue of the termination date of the plan and impact upon federal largesse. The plan participants are entitled to actual notice of the proceeding provided by the statutory trustee after appointment. However, Heppenstall is absolutely correct in that §1342(c) gives plan part-

icipants "a statutory right to consideration of the protection of their interests in contested termination proceedings" 633 F.2d at 301-302, supra. Here, the plan participants are "left in the dark" with no statutory rights. Id. The Opinion of the Circuit Court in this matter is contrary to Heppenstall. Id.

Actual notice to plan participants is the plain meaning of 29 U.S.C. §1342(d)(2). This is what Congress intended, and it does not sound too outrageous. 29 U.S.C. §1342(d)(2)(B), supra. The alternative is that plan participants are "kept in the dark" about the termination proceedings of the plan in which their interests are represented by others. Id. Heppenstall, supra, such as the case here. If the federal courts are required to follow the plain meaning of §1342(d)(2)(B) and to require the statutory

trustee to give actual notice to plan participants, this need not disturb the "constructive notice" analysis of Heppenstall and its progeny to establish a termination date of the plan, notwithstanding the fact that "constructive notice is no notice at all". Shacket v. Philko Aviation, Inc., 841 F.2d 166, 171 (7th Cir.-1988); and, see, In re: Pan American Airways, 777 F. Supp. 1179 (S.D. N.Y.-1991).

II. SECOND SUBSTANTIAL DEPARTURE FROM THE LAWS OF THE UNITED STATES

PLAN PARTICIPANTS ARE BEING DEPRIVED OF THEIR RIGHT TO BE HEARD AFFORDED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

The controlling case outlining the plan participants' right to be heard pursuant to the procedural arm of the Due Process Clause is Goldberg v. Kelly, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct.

1011. The right to be heard when one's interests are being determined is an ininstinctive one with "ancient roots". Id.

Of course, "the right to be heard would be of little avail" if it did not comprehend the right to be heard by counsel. Goldberg, at 397 U.S. 270, 271. The Supreme Court held that any person who has interests being determined "must be allowed to retain an attorney." Id. The Opinion of the Circuit Court in this matter is in conflict with Goldberg v. Kelly.

The PBGC has determined that plan participants are "necessary parties" to a plan termination action pursuant to Rule 19(a) Fed.R.Civ.P. LLC Corporation v. PBGC., 703F2d 301, 305 (8th Cir.-1983). The decision in LLC Corp. rejecting PBGC's determination that plan part-

icipants were "necessary parties" pursuant to Rule 19(a) hinged on the following:

> The resolution of the issue of LLC's right to the possession of the escrow fund without government interference will result in complete relief between the present parties.

703 F.2d 305. In other words, the plan terminated in LLC Corp. was an "excess funded" plan being cashed out. The plan administrator and fiduciaries to the plan would be there, exposed to liability from participants. Id. Such is not the case here. The PBGC was absolutely correct in LLC Corp. in its determination that plan participants are "necessary parties" pursuant to Rule 19(a). "Necessary parties" are those affected by the judgment and against which in fact it will operate. West Coast Exploration Co. v. McKay, 213 F.2d 582, 93 U.S.App.D.C. 307, certiorari denied 74 S.Ct. 850, 347 U.S. 989, 98 L.Ed 1123 (1954).

It is clear from the opinions below that the lower courts belabor the idea that the "Appearance" of counsel for plan participants should be characterized as a "motion to intervene" pursuant to Rule 24 of Fed.R.Civ.P. Appendixes B, C, D, passim. Then, the lower courts elaborate that the "motion to intervene" is untimely pursuant to common federal law. Id. Here, plan participants are left to speculate why this case lay dormant two years after the purported agreement of March, 1988, yet their motion to intervene would be untimely. The plan participants make reasonable allegations that if there was an agreement in March, 1988, then the purported parties were far beyond acceptable neglect in failing to formally close the case so plan participants could get on with their lives and administrative appeals to the PBGC, and that plan part-

icipants are free to retain counsel to ascertain what was going on in the face of neglect and inactivity four years after the plan terminated. App., at page 75.

However, plan participants never did want to talk about whether or not the Appearance of their counsel was a timely motion to intervene. That is because plan participants have always asserted from day one that they are "necessary parties" pursuant to Rule 19(a) Fed.R.-Civ.P., West Coast Exploration and LLC Corp., supra. If so, then the issue of whether the plan participants made a timely "motion to intervene" is moot. It is equally clear that the lower courts do not want to talk about what the Union was doing here if the Union's motion to intervene did not include the plan participants. That is because the lower

courts are sanctioning a bifurcation of the plan participants from their interests to property contrary to plain statutory and common law. 29 U.S.C. §1342(d)(2)-(B), supra, at page 3, does infer plan participants are "interested parties". Nevertheless, in the opinions below the plan participants are "non-parties". "[Plan participants] are not parties in this proceeding and cannot be made parties simply by appearing." App. "D", infra, at page 76. There is no authority cited by the bankruptcy court for the determination that plan participants are "non-parties" to plan termination proceedings. That is because there is none.

III. THIRD SUBSTANTIAL DEPARTURE FROM THE LAWS OF THE UNITED STATES

THE PARTICIPATION OF THE UNION IN THIS PROCEEDING IS CONTRARY TO LAW

The Circuit Court has adopted the reasoning of the district court in determining that maybe the Union represented plan participants in this proceeding, or maybe it did not. App. "C", at 68-69. However, if the Union did not represent the plan participants, what is the Union doing filing objection to intervene by plan participants on grounds that it is the "exclusive bargaining agent" for plan participants and held "valid Powers of Attorney" from the plan participants as of March 8, 1988? Conflicting terms to say the least, since if the Union is the participants' "exclusive bargaining agent", then powers of attorney would not be needed. No matter, the Union represented plan participants' interests. See, letter of Judge Vandivier to Kauble, App. "F", at page 83.

The blithe failure of the Circuit

Court to analyze what legitimate authority the Union had to participate in this proceeding is an evasion of transparent substantial departures from the laws of the United States in this proceeding. The Union could not be the exclusive bargaining agent of plan participants pursuant to Allied Chemical & Alkali Workers of America, Local #1 v. P.P.G. Co., 404 U.S. 157, 30 L.Ed.2d 341, 92 S.Ct. 383 (1971). The "holding" of Allied Chemical:

> [13] In this cause, in addition to holding that pensioners are not "employees" within the meaning of the collective-bargaining obligations of the Act, we hold that they were not and could not be "employees" included in the bargaining unit ....
>
> Although those terms may include persons on temporary or limited absence from work, such as employees on military duty, it would destroy the function of language to read them as embracing those whose work has ceased with no expectation of return.

[404 U.S. at 172, L.Ed.2d at 353]

It is clear that Continental Steel, as an ongoing entity, ceased to exist upon the conversion to Chapter 7 on February 25, 1986, preceding in time the termination of Pension Plan "A" and Agreed Entry on March 12, 1986. Pursuant to definitions found in 29 U.S.C. §§1002, et seq., there could not possibly be an "employee organization" or "employment relationship" after Feb. 25, 1986, because there was no "employer" or "employees". Thus, the plan participants are former employees after Feb. 25, 1986 and "retirees" pursuant to Allied Chemical, supra. Therefore, the Union was not exclusive bargaining agent of plan participants two years later in March, 1988, when the Union filed objection to plan participants' motion to intervene asserting the Union "is" the exclusive bargain-

ing agent of plan participants and that it held valid powers of attorney that do not exist. Id.

The plan participants were real plain about the "valid Powers of Attorney" asserted by the Union in objection. These "Powers of Attorney" are required by law to be evidenced in the record. Rule 9010(c) of the Bankruptcy Rules of Procedure. The plan participants state that counsel for the Union falsely asserted "valid Powers of Attorney" that do not exist. Id. This is undisputed by the Union. It can easily be ascertained whether or not they exist by requiring the Union to conform to the law and file the "valid Powers of Attorney" asserted by the counsel for the Union. Rule 9010 (c) Bk.R.

Counsel for the Union had written to plan participant H. Dean Bousum on May

18, 1987, to advise him that the Powers of Attorney executed in favor of the Union for wage claims against the bankrupt estate had nothing to do with the pension litigation. Letter to Bousum, infra, at App. "E", pages 81-82. Again, the lower courts do not want to talk about what the plan participants want to talk about, to wit, the fraudulent assertion of powers of attorney by the Union that do not exist and a complete record as required by law. Rule 9010(a) Bk.R. In the "Appearance" of counsel for plan participants referenced where original Powers of Attorney executed by plan participants could be found in the core bankruptcy proceeding of Continental Steel.

Notwithstanding the fact that Continental Steel ceased operations on Feb. 25, 1986, pursuant to Chapter 7, the pension plan was terminated by the March

12, 1986 Agreed Entry which logically extinguished any remaining relationship between the Union and plan participants upon termination of the pension plan as the only remaining link between the Union and its former "employee" members.

The failure of the Circuit Court to address the issue of the Union's participation in this proceeding is sanctioning substantial departures from the laws of the United States. 29 U.S.C. §§1002, et seq.; Allied Chemical; Rule 9010(c) Bk.R.

IV. FOURTH SUBSTANTIAL DEPARTURE FROM LAWS OF THE UNITED STATES

BANKRUPTCY COURTS ARE NOT COURTS OF GENERAL JURISDICTION

The agreement as to the termination date of the pension plan approved by the bankruptcy court on March 10, 1988 was entered into the record of the bankruptcy

proceeding rather than in this proceeding to terminate the plan where it may have been "appropriate". 28 U.S.C. §157(c). The pension plan termination date agreement was inappropriate in the bankruptcy court. That is because the bankruptcy court is not a court of general jurisdiction. Northern Pipeline Co. v. Marathon Pipeline Co. (hereafter, "Marathon"), 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1983) and 11 U.S.C. §157. Courts of limited jurisdiction must show their jurisdiction. Re: Cuddy 131 U.S. 280, 9 S.Ct. 703 33 L.Ed. 435. The decision of the Circuit Court blithely relies on the determinations by a bankruptcy court without jurisdiction to make such determinations..

Here, the lower courts are finding the legal effect of a Settlement Agreement approved by a bankruptcy court in a core

bankruptcy proceeding as to the termination date of the pension plan as binding on plan participants. The bankruptcy court had no jurisdiction to approve the Settlement Agreement and set a termination date in the bankruptcy proceeding. This is in conflict with Marathon and 28 U.S.C. §157.

V. FIFTH SUBSTANTIAL DEPARTURE FROM THE LAWS OF THE UNITED STATES

THE IMPOSITION OF SANCTIONS BY THE CIRCUIT COURT WAS AN IMPERMISSIBLE ABUSE OF DISCRETION

The Circuit Court found that sanctions against the plan participants' attorney were appropriate since the result was "foreordained by the lack of substance to the appellants arguments" citing Mars Steel Corp. v. Continental Bank N.A., 800 F.2d. 928, 938 (7th Cir.-1989). App. "B", infra, at pages 57-58.

The first three substantial departures from the laws of the United States delineated in this Petition were properly raised by plan participants from day one. It is transparently obvious that the Circuit Court has avoided the issues raised on appeal to address issues of its own choosing. App. "B", infra, pages 44-60.

If the plan participants have a fundamental right to be heard, then "timeliness" issues under Rule 24 are moot. Second Departure at pages 20-25, supra. Appellants state the issues. Nevertheless, the Circuit Court avoids the issues raised by plan participants. How is it established for the record of this proceeding that the "result was foreordained by the lack of substance to the Appellant[s'] arguments" per Mars Steel, supra, when the Circuit Court failed to address the substance of Appellants'

PUBLISHER'S NOTE

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PG. 35

information to any interested party concerning the administration of assets with duties as delineated by 11 U.S.C. §704, supra, at page 4. Nothing like that here. Instead, silence and evasion of statutory duties. How the lower courts can discuss a plan termination proceeding without mentioning ERISA [29 U.S.C. §1001, et seq.] is a wonderment to behold. App. "B", "C" and "D", infra, at pages 41-80, passim.

CONCLUSION

For the foregoing substantial departures from the laws of the United States, plan participants ask that Writ of Certiorari shall issue to the Seventh Circuit of Appeals. Because of the substantial numbers of plan participants of other pension plans who are similarly situated as plan participants herein, and the lack

of guidance in common federal law on the issues raised by plan participants in this Petition, this Petition is worthy of the Supreme Court's attention and review.

PRECISE RELIEF REQUESTED

That Writ of Certiorari shall issue to the Seventh Circuit Court of Appeals on the issues of whether the plan participants are entitled to actual notice from the plain meaning of 29 U.S.C. §1342(d)(2)(B), and whether plan participants are "interested parties" under 29 U.S.C. §1342(d)(2) and "necessary parties" pursuant to Rule 19(a) Fed.R.Civ.P. in litigation of their rights and entitlements, and whether plan participants have a fundamental right to be heard where their interests are being litigated.

RESPECTFULLY SUBMITTED BY:

Mark Garringer
Attorney for Petitioners
2802 North Delaware Street
Indianapolis, Indiana 46205
Tel: (317)925-4110

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

August 7, 1992

Before

Hon. Joel M. Flaum, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

Hon. Milton I. Shadur, District Judge*

No. 91-3368

IN THE MATTER OF: CONTINENTAL STEEL CORPORATION, formerly known as Penn Dixie Steel Corporation, formerly known as Penn Dixie Industries, Incorporated,	) Appeal from the United States District Court for the S.D. of Indiana, Indianapolis, Division.
Debtor,	) 90 C 2190
APPEAL OF: PHIL KAUBLE, GERALD E. AILOR, DONALD E. ANDERSON, et al.	) S. Hugh Dillin, Judge

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Appellants, Phil Kauble, Gerald E. Ailor, Donald E. Anderson, et al., no

judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

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* Hon. Milton I. Shadur, District Judge for the Northern District of Illinois, is sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JUDGMENT - WITH ORAL ARGUMENT

July 10, 1992

Before

Hon. Joel M. Flaum, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

Hon. Milton I. Shadur, District Judge*

No. 91-3368

IN THE MATTER OF: CONTINENTAL STEEL CORPORATION, formerly known as Penn Dixie Steel Corporation, formerly known as Penn Dixie Industries, Incorporated,	) Appeal from the United States District Court for the S.D. of Indiana, Indianapolis, Division
Debtor,	) No. 90 C 2190
APPEAL OF: PHIL KAUBLE, GERALD E. AILOR, DONALD E. ANDERSON, et al.,	) Judge, S. Hugh Dillin

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, with costs and with SANCTIONS; appellant's counsel shall file a brief within fifteen days of this decision explaining why he should not pay the appellee's costs for this appeal, see Circuit Rule 38; during the same time period, the appellees should provide this court with a statement of their costs and fees, in accordance with the decision of this court entered this date.

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* The Honorable Milton I. Shadur, District Judge for the Northern District of Illinois, is sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ARGUED April 7, 1992
July 10, 1992

Before

Hon. Joel M. Flaum, Circuit Judge

Hon. Daniel A. Manion, Circuit Judge

Hon. Milton I. Shadur, District Judge*

No. 91-3368

IN THE MATTER OF: CONTINENTAL STEEL CORPORATION formerly known as Penn Dixie Steel Corporation, formerly known as Penn Dixie Industries, Incorporated,	)	Appeal from the United States District Court for the S.D. of Indiana, Indianapolis Division.
Debtor,	)	90 C 2190
APPEAL OF: PHIL KAUBLE, GERALD E. AILOR, DONALD E. ANDERSON, et al.,	)	S. Hugh Dillin, Judge

ORDER

The bankruptcy court approved a settlement agreement in Adversary Proceeding No. 86-141 on March 10, 1988. On

November 8, 1990, attorney Mark Garringer file a notice of appearance on behalf of the appellants and a motion to compel discovery in the United States Bankruptcy Court for the Southern District of Indiana on behalf of the appellants in Adversary Proceeding No. 86-141. The bankruptcy court entered an order striking the notice of appearance and the motion to compel discovery, and the district court affirmed the order. We affirm the district court's order.

I. Background

The dispute at issue arises from Adversary Proceeding No. 86-141. Some background on the proceedings will place the dispute in context.

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* Hon. Milton I. Shadur, District Judge for the Northern District of Illinois, is sitting by designation.

The appellants, former employees of Continental Steel Corporation ("Continental"), are participants in the Continental Steel Corporation 1950 Employee Pension Plan A ("Plan A"). The Pension Benefit Guaranty Corporation ("PBGC") is a wholly owned United States government corporation that administers and enforces the pension plan termination insurance program under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1301-1461. On February 12, 1986 PBGC issued a Notice of Determination to Continental, Plan A's administrator. The Notice stated that PBGC had determined that Plan A had not met the minimum funding standard of section 412 of the Internal Revenue Code, and that the possible future loss to the PBGC with respect to Plan A could be

expected to increase unreasonably if Plan A was not terminated. The Notice further stated that it was necessary to appoint PBGC as statutory trustee of Plan A to avoid any unreasonable deterioration of the financial condition of the Plan. Finally, the Notice indicated that the PBGC intended to apply to the United States District Court for an order appointing the PBGC statutory trustee of Plan A and setting February 14, 1986 as the date of Plan termination. On February 12, 1986, PBGC sent copies of the Notice to Continental, to United Steelworkers of America Locals 1054 and 3601 ("Union") and to their counsel.

The PBGC filed the application to terminate Plan A in the district court pursuant to 29 U.S.C. §1342. To notify participants, a copy of the Notice was

published in two major newspapers on February 17 and 18, 1986. The district court referred the matter to the bankruptcy court where it was designated an Adversary Proceeding No. 86-141 within Continental's bankruptcy proceedings.

On February 19, 1986, the Union moved to intervene in Adversary Proceeding No. 86-141 to object to PBGC's application to terminate Plan A and to propose date of termination. The Union asserted that it continued to be the "official bargaining agent for the employees who have rights in and are beneficiaries of [the Plan]." The appellants were Union members and were represented by the Union.

After converting Continental's bankruptcy from Chapter 11 to Chapter 7, the bankruptcy court approved the termination of Plan A and appointed PBGC

as statutory trustee. The bankruptcy court did not resolve the date of the Plan's termination. Therefore, the Union, the PBGC and the bankruptcy trustee entered negotiations over the date.

On February 1, 1988, over 200 participants (including most of the appellants) moved to intervene in Adversary Proceeding No. 86-141. On February 23, 1988, the Union, the bankruptcy trustee and PBGC entered into a settlement agreement setting February 25, 1986 as the date of termination of Plan A. On March 10, 1988, the bankruptcy court held a hearing to review the settlement and approve it. The participants who had moved to intervene were represented by counsel at the hearing. The bankruptcy court found that the participants withdrew their motion to intervene although

no withdrawal appears in the record.

Although the bankruptcy court approved the settlement agreement, it did not enter an order dismissing the case. On November 8, 1990, Mark Garringer entered a notice of appearance on behalf of 128 participants (100 of whom were the same as the participants who had moved to intervene in 1988) and filed the motion to compel discovery which created the issue in this appeal. The bankruptcy court struck both the notice and the motion after reasoning that the appellants were not parties and could not become parties without moving to intervene under Bankruptcy Rule 7024. Without being parties, the appellants lacked standing to compel discovery. The district court affirmed the bankruptcy court. The district court reasoned that if the appellants were represented by

the Union, then they had already intervened and their interests were represented in the proceeding. Alternatively, if the appellants were not represented by the Union and the notice of appearance were construed as a motion to intervene two and one-half years after settlement would be untimely and not permitted by Bankruptcy Rule 7024. Even if the February 1, 1988 motion to intervene on behalf of 100 of the appellants had not been withdrawn at the hearing on March 10, 1988, the district court determined that those 100 appellants had waived any objection to the settlement agreement because their counsel had failed to speak against it.

II. Analysis

Although the appellants include arguments in their brief regarding the March 10, 1988 settlement agreement, they have

timely appealed only the district court's September 23, 1991 order affirming the bankruptcy court's November 14, 1990 order striking Garringer's notice of appearance and motion to compel discovery. Fed. R. App. P. 4(a)(1). Accordingly, we have no jurisdiction to consider the other matters raised by the appellants. Cf. Matter of Schultz Mfg. Fabricating Co., 956 F.2d 686, 689 (7th Cir. 1992) (district court had no jurisdiction to review the bankruptcy court's orders that were not timely appealed).

In its November 14, 1991 order, the bankruptcy court struck Mark Garringer's notice of appearance because either the appellants' interests have been represented, or, alternatively, the appellants were not proper parties to Adversary Proceeding 86-141. We review the bankruptcy court's findings of fact

for clear error. We review its legal conclusions de novo. In re Matters of Love, 957 F.2d 1350, 1354 (7th Cir.1992)

Under the Southern District of Indiana Local Rule 2, only a "party" can have counsel file notice of appearance. See S.D. Ind. Local Rule 2(a)(1983). Likewise, under Fed. R. Civ. P. 37, only a "party" can file a motion to compel discovery. See Fed. R. Civ. P. 37(a). The appellants are not and have never claimed to be named parties to the original Adverse Proceeding 86-141. They can therefore be parties only if they have properly intervened under Bankruptcy Rule 7024 which incorporates Fed. R. Civ. P. 24.

If the appellants were represented by the Union, which properly intervened in 1986, then their interests already have been represented in the settlement

agreement, and the appellants cannot come to the court now with new counsel and object to the settlement agreement. Assuming that the appellants are correct in arguing that the Union did not represent their interests, however, they still cannot have counsel file a notice of appearance. The only conceivable basis for appellants to file a notice of appearance is if the motion to intervene, filed by some of the appellants on February 1, 1988 somehow preserved a basis for filing the later notice of appearance. If the February 1, 1988 motion to intervene was withdrawn, however, then the question becomes whether the notice of appearance can be construed as a motion to intervene, and if so, whether that motion to intervene would be timely.

The bankruptcy court found that the

appellants' February 1, 1988 motion to intervene was withdrawn on March 10, 1988. Since we review the bankruptcy court's finding of fact for clear error, we will not reverse those findings unless we are "left with the definite and firm conviction that a mistake has been committed." In re Matter of Love, 957 F.2d at 1354. Although the withdrawal does not appear on the record, the appellants have not offered affidavits from the counsel who filed the February 1, 1988 motion or any other evidence to contradict the bankruptcy court's finding. We therefore cannot conclude that finding the motion to intervene was withdrawn is clearly erroneous. Since the February 1, 1988 motion was withdrawn, the appellants cannot rely on it to establish their status as parties to Adversary Proceeding 86-141.

Even though the appellants never filed a proper motion to intervene, both the bankruptcy and district courts considered whether the appellants could intervene now. Even if a notice of appearance could substitute for a motion to intervene under Fed. R. Civ. P. 24, such a motion would be untimely. In determining whether a motion to intervene is untimely, the court would consider (1) the length of time the intervenor knew or should have known of his or her interest in the case, (2) the prejudice to the original party caused by the delay, (3) the resulting prejudice to the intervenor if the motion is denied, and (4) any unusual circumstances. Ragsdale v. Turnock, 941 F.2d 501, 504 (7th Cir. 1991), cert denied sub nom. Murphy v. Ragsdale, 112 S.Ct. 879 (1992) (citation omitted). The appellants, who

indisputably knew of their interest in the case long before the settlement agreement was signed, would have difficulty in persuading the court that under these factors intervention should be granted. Cf. Ragsdale v. Turnock, 941 F.2d at 504-505 (granting motion to intervene after settlement agreement would be highly prejudicial); County of Orange v. Air California, 799 F.2d 535, 537-38 (9th Cir. 1986), cert. denied sub nom. City of Irvine v. Orange County, 480 U.S. 946 (1987) (district court did not abuse discretion in denying, as untimely, city's motion to intervene as of right where city's motion was made only after settlement had been reached between all the parties after five years of litigation). On appeal, any denial of a motion to intervene as untimely would be reviewed only for abuse of dis-

cretion. Schultz v. Connery, 863 F.2d 551, 553 (7th Cir. 1988).

In short, even if the appellants were not represented by the Union, they cannot have counsel file a notice of appearance or file a motion to compel discovery because they have no valid basis for filing a motion to intervene to become a party to Adversary Proceeding 86-141.

As a final matter, we sanction the appellants' counsel pursuant to Fed. R. App. P. 38. Rule 38 sanctions are appropriate if: (1) the appeal is frivolous and (2) sanctions are appropriate. A-Abart Elec. Supply, Inc. v. Emerson Elec. Co., 956 F.2d 1399, 1406 (7th Cir. 1992). We have stated before that an appeal is frivolous when the result is "foreordained by the lack of substance to the appellant[s'] arguments." Mars

Steel Corp. v. Continental Bank N.A., 880 F.2d 928, 938 (7th Cir. 1989) (en banc). We also have stated that sanctions are appropriate when an appeal is "prosecuted with no reasonable hope of altering the districts court's judgment and for purposes of delay, harassment or sheer obstinacy." A-Abart Elec. Supply, 956 F.2d at 1407. Furthermore, "[t]he standard depends on the work product: neither the lawyer's state of mind nor the preparation behind the appeal matter." Id. at 939.

Applying the standards set out above, sanctions are appropriate in this case. As mentioned above, the appellants' brief and oral argument largely failed to focus on the issues raised by their appeal. Rather than responding to the reasoning of the bankruptcy court's order striking Garringer's notice of

appearance and motion to compel discovery or refuting the district court's analysis, their brief concentrated on issues surrounding the approval of the settlement agreement. The settlement agreement, however, was not timely appealed and was therefore not at issue. With unresponsive and irrelevant arguments, the appellants could have had no expectation of altering the judgement. Cf. Williams v. Leach, 938 F.2d 769, 775 (7th Cir. 1991).

In short, Attorney Garringer's performance fell far short of the level of advocacy demanded by this court. Accordingly, damages assessed against appellants' counsel are appropriate under Rule 38. See A-Abart Elec. Supply, 956 F.2d at 1407 (sanctions may be imposed against either an appellant or the appellant's attorney). Appellants'

counsel shall file a brief within fifteen days of this decision explaining why he should not pay the appellees' costs for this appeal. See Circuit Rule 38. During the same time period, the appellees should provide this court with a statement of their costs and fees.

For the reasons outlined above, we AFFIRM WITH SANCTIONS.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PHIL KAUBLE, et al., Appellants, vs. UNITED STEELWORKERS OF AMERICA, Appellees,	Cause No. IP-90-2190-C
IN RE: CONTINENTAL STEEL CORPORATION, f/k/a PENN-DIXIE STEEL CORPORATION, f/k/a PENN-DIXIE INDUSTRIES, INC., Debtor,	Bankruptcy No. IP-85-5415-V
PENSION BENEFIT GUARANTY CORPORATION, Petitioner, vs CONTINENTAL STEEL CORPORATION, Respondent.	Adversary Proceeding No. 86-141

ENTRY

This cause comes before the Court on appeal from the United States Bankruptcy Court's Order of November 14, 1990, striking the appearance of the appellants' attorney, Mark Garringer, and also striking the appellants' motion to compel discovery. For the following reasons, the Bankruptcy Court's Order is affirmed.

Background

Phil Kauble and the other plaintiffs are past employees of Continental Steel Corporation (Continental) and past members of defendant United Steelworkers of America (Union). On November 25, 1985, Continental filed for bankruptcy under Chapter 11 of the Bankruptcy Code (Cause No. IP-85-5415-V). This action was converted to a Chapter 7 liquidation on February 25, 1986.

The Pension Benefit Guaranty Corp-

oration (PBGC) is a United States Government Corporation established under 29 U.S.C. §1302(a) that administers and enforces the pension plan termination insurance program of Title IV of the Employe Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. §§ 1301-1461. When a covered pension plan lacks sufficient funds to satisfy statutorily guaranteed benefits, PBGC takes over these assets and liabilities of the plan, makes up some deficiencies, and pays benefits to plan participants. These insured benefits may be less than those benefits which would have been paid had the pension continued.

In early 1986, PBGC determined that Continental's pension plan "A" (plan "A"), despite having millions in assets, was underfunded in an actuarial sense by approximately $40 million, and that Con-

tinental was not entitled to a waiver for this underfunding. Accordingly, on February 14, 1986, PBGC initiated a proceeding in this Court under 29 U.S.C. § 1342 against Continental to terminate and protect plan "A". That action was referred to the Bankruptcy Court for the Southern District of Indiana and became the proceeding from which this appeal arises, Adversary Proceeding No. 86-141 (AP 86-141).

At issue in AP 86-141 was the date of termination of plan "A". This date was critical to the determination of lay-off and shutdown benefits. If the termination date was set prior to Continental's Feb. 24, 1986, shutdown, certain benefits would not be guaranteed. PBGC advocated a termination date of February 14, 1986, i.e., the date that it filed for termination. Intervening in AP 86-

141 were Continental's major unsecured claimants, the Environmental Protection Agency and the Indiana Department of Environmental Management. Also intervening was the Union on behalf of all individual plan participants.

On March 12, 1986, the Bankruptcy Court ordered that plan "A" be terminated and that PBGC be appointed statutory trustee. During the remainder of 1986 and most of 1987, little activity took place. However, in late 1987 and early 1988 the parties began negotiating a settlement.

On February 1, 1988, Kauble and many, if not all, of the present plaintiffs moved to intervene in AP 86-141 to have their interests represented by non-Union counsel, they being upset with the apparent inaction of the Union. However, after learning of the specific provi-

sions of a proposed settlement, counsel then representing these plaintiffs withdrew the motion to intervene at a March 10, 1988, hearing. All have acted on the validity of the withdrawal, but this withdrawal was never entered into the Bankruptcy Court's docket.

The settlement agreement in AP 86-141 was approved by the Bankruptcy Court at the March 10, 1988, hearing. The agreement set the termination dates of the pension plans, the principle dispute, as February 25, 1986, i.e. one day after Continental's shutdown. Thus, the employees became eligible for shutdown benefits. This settlement has long been final.

In his Entry Judge Vandiver noted that after the settlement, AP 86-141 was ready to be closed. However, the parties neglected to take any action which would

have allowed the court to formally close the case.

On November 8, 1990, the appellants' present attorney, Mark Garringer, filed an appearance in AP 86-141 on behalf of several unnamed wage and benefit claimants, and at the same time filed a motion to compel discovery. Judge Vandiver struck both Garringer's appearance and the motion to compel on November 14, 1990. It is from this Entry which the appellants now appeal.

Memorandum of Opinion

This Court is constrained to accept the Bankruptcy Court's findings of fact unless they are clearly erroneous. Matter of Excalibur Auto Corp., 859 F.2d 454, 457 n.3 (7th Cir.1988) (construing Rule 8013, F.R.Bankr.P.). Conclusions of law are reviewed de novo. Id.

The Bankruptcy Court denied Garring-

ger's appearance because [1] "his clients are not parties ... and cannot be made parties simply by appearing, and [2] "Any interest his clients had in this case has been finally adjudicated and intervention at this point would appear to be without purpose." The Bankruptcy Court denied the motion to compel for [1] lack of standing, and [2] because it was premature as no discovery request had been tendered.

It is clear that the present appellants are not parties to AP 86-141, since AP 86-141 is PBGC's action against Continental. As such, to become a part of this proceeding intervention is required. However, if appellants were represented by the Union in AP 86-141, then they have already intervened and their interests were represented. Thus, the appellants are estopped from assert-

ing, two years after settlement, some new position with new counsel.

If, on the other hand, appellants were not represented by the Union, they have waived any interest they might have had in the proceeding. Simply put, appellants intervention, two years after settlement, is untimely and will not be allowed. See Bankruptcy Rule 7024 (incorporating Rule 24, Fed.R.Civ.P. and requiring timely intervention.

The appellants contend that their Feb. 1, 1988, motion to intervene was never withdrawn. Thus, they argue that their motion to intervene is still pending. However, whether the appellants' previous counsel withdrew their motion is a finding of fact and must be upheld unless it is clearly erroneous. Since no evidence, such as affidavits from previous counsel, has been submitted to

contradict the Bankruptcy Court's finding, we will uphold it. In any event, even if appellants' former counsel had not withdrawn their motion to intervene, any interest which the appellants may have had has been waived because it is beyond dispute that their counsel were present at the settlement and failed to speak against it. In fact, it can be inferred that the appellants' previous counsel thought, as this Court does now, that the settlement is in the appellants' best interests.

The appellants have raised numerous other arguments on appeal. However, they are not pertinent as to whether attorney Garringer may be allowed to enter an appearance in this action.

As discussed above, this is not procedurally acceptable.

Accordingly, the Bankruptcy Court's

Entry striking the appearance of Garr-inger and denying the motion to compel discovery is affirmed.

Dated this 23rd day of September, 1991.

APPENDIX D

UNITED STATE BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:	) BANKRUPTCY NO.
	) IP85-5415-RWV-7
CONTINENTAL STEEL CORPORATION, f/k/a PENN-DIXIE STEEL CORPORATION and PENN-DIXIE INDUSTRIES, INC.,	)
Debtor.	)
PENSION BENEFIT GUARANTY CORPORATION	) Adversary Proceeding No. 86-141
Applicant,	)
vs.	)
CONTINENTAL STEEL CORPORATION, Plan Administrator of the Continental Steel Corporation 1950 Employees Pension Plan A,	)
Respondent.	)

ENTRY STRIKING APPEARANCE AND MOTION TO COMPEL DISCOVERY AND ORDER FOR PLAINTIFF TO PROCEED

This matter comes before the Court on the Appearance and the motion to Compel

Discovery, both filed on November 8, 1990, by Mark Garringer on behalf of Phil Kauble and certain other unnamed wage and benefit claimants ("the claimants"). The Court strikes these filings for the reasons below.

1. The adversary proceeding began in the district court on February 14, 1986, when the Pension Benefits Guaranty Corporation ("the PBGC") brought suit against the Debtor under ERISA to terminate certain of the Debtor's underfunded pension plans. The district court referred this matter to this Court because of the Debtor's pending bankruptcy. There are, however, no bankruptcy issues presented in the case.

2. The matters presented in the adversary proceeding were fully resolved by agreement, and the Court made no ruling on any substantive issue, save ap-

proving the settlement. The parties early on agreed that the plans should be terminated, but settlement of the issue of the termination date took extensive negotiations. The Court approved the final settlement after a hearing on March 10, 1988, which was noticed to all creditors.

3. The United Steel Workers and two of its locals (together "the Union"), on behalf of participants and beneficiaries of one of the plans, by counsel representing the Union, moved to intervene on February 19, 1986. Though there was no formal ruling on this motion (apparently by oversight, since there was no objection to intervention), the Union was permitted to participate in the proceedings. Some individual employees and beneficiaries, including Mr. Kauble and other of Mr. Garringer's clients, moved

to intervene on February 1, 1988, but counsel then representing them withdrew the motion at hearing of March 10, 1988.

4. Since the controversy has been settled, the case has long been ready to be closed, presumably by an agreed dismissal by the parties. The parties, however, have neglected to take action which would allow the Court to formally close the case.

5. Mr. Garringer cites as a basis for his appearance this remark by the Court in an April 12, 1989, hearing: "The Court has not authorized counsel for any of the potential beneficiaries of the pension benefits. If there are attorneys representing these people, they certainly haven't surfaced to my memory in any phase of this case. They are free to retain counsel, as is any person ..." Mr. Garringer purports to be "surfacing"

now.

6. The hearing Mr. Garringer refers to was in the bankruptcy case itself, not in this adversary proceeding, and the issue at that hearing was not the termination of the pension plans, but the subsequent global settlement of the major claims against the estate. Thus, even if this statement can be interpreted as giving Mr. Garringer's clients a right to appear in the bankruptcy case itself (which some of his clients have indeed done), it does not confer a right to intervene in the many separate adversary proceeding associated with this case. His clients are not parties in this proceeding and cannot be made parties simply by appearing. The proper avenue for his clients would be to move to intervene under Bankruptcy Rule 7024, alleging and demonstrating the right to

intervene. His clients are indeed free to retain counsel, but the counsel they retain is not excused from complying with the rule that are essential to the orderly administration of the estate. Because the appearance of Mr. Garringer and his clients have not complied with the requirements of these rules, it will be stricken.

7. Even if Mr. Garringer had filed a motion to intervene rather than an appearance, the Court cannot imagine any possible grounds for intervention at this point in this case, which was resolved by a settlement that has been final and nonappealable for two and a half years. Any interest his clients had in this case has been finally adjudicated and intervention at this point would appear to be without purpose. The Court advises Mr. Garringer that before filing

a motion to intervene, or any other pleading in this bankruptcy case, that he has the duty to ascertain that the pleading is well grounded in fact and warranted by existing law or good faith argument for the extension, modification or reversal of existing law, and that such pleadings may not be interposed for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation. See Bankruptcy Rule 9011.

8. Because Mr. Garringer's clients are not parties to this proceeding, they have no standing to file their Motion to Compel Discovery. Additionally, even if these claimants were parties, the motion is procedurally defective. A motion to compel is appropriate only after a discovery request has been made and the other party has failed to respond. See Bankruptcy Rule 7027, incorporating Rule

37(a)(2) of the Federal Rules of Civil Procedure. Thus, a motion to compel may not be filed with the discovery request, and Mr. Garringer's motion is premature, even assuming his clients' standing. Therefore, the motion will be stricken.

9. The Plaintiff has taken no formal action in this case since 1988. Although the matter has been settled to the parties' satisfaction, the Court still needs to formally close the case. The Court will therefore order the Plaintiff to proceed within the 14 days of this order by taking appropriate action to advance this case to closing, or this Court will dismiss the case for want of prosecution.

The Court therefore:

1. STRIKES the Appearance and Motion to Compel Discovery filed by Mr. Garringer on November 8, 1990, and

2. ORDERS the Plaintiff to proceed within 14 days of this order, or this case will be dismissed for want or prosecution.

APPENDIX E

BAMBERGER & FEIBLEMAN

LAWYERS

500 UNION FEDERAL BUILDING

45 NORTH PENNSYLVANIA STREET

INDIANAPOLIS, INDIANA 46204

May 18, 1987

H. Dean Bousum
821 West Woodland
Kokomo, Indiana 46902

Dear Mr. Bousum:

In reply to your letter of May 14, 1987, please be advised that the Power of Attorney which gave authority to the Union to enter into the Settlement Agreement is not connected to the Rule of 65 matter.

The Power of Attorney authorizes the Union to enter into the agreement with the Bankruptcy Trustee which will allow a part of your claims agains (sic) the company to be paid.

Your right to receive early shutdown benefit under the Rule of 65 is separate and apart from that settlement. Further, the Pension Benefit Guaranty Corporation is a party to the Settlement Agreement and has made no requirement that the settlement take away your Rule of 65 pension plan.

In fact, at a post-hearing conference in our lawsuit with the PBGC regarding the Rule of 65, the parties indicated to Judge Vandivier that there was no way to settle the Rule of 65 case and that it would be necessary that he render his opinion in order to allow the parties to move forward.

Accordingly, your completion of the Power of Attorney giving authority to the Union to enter into the Settlement Agreement with the Bankruptcy Trustee is not related to the Rule of 65 case nor does entering into the settlement waive or otherwise give away your early retirement pension.

If you have any further questions regarding this matter, please do not hesitate to contact us.

Very truly yours,

BAMBERGER & FEIBLEMAN

By Paul T. Deignan

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

COURT OF BANKRUPTCY

U.S. COURTHOUSE

INDIANAPOLIS, INDIANA 46204

April 25, 1988

Mr. Phil Kauble
Pension Rights Committee Spokesman
1024 S. McCann Street
Kokomo, IN 46902

RE: Continental Steel Corporation
IP85-5415 V

Dear Mr. Kauble:

This is to acknowledge receipt of your correspondence dated April 22, 1988, regarding the above-captioned bankruptcy case.

Your letter had (sic) been referred to Paul Deignan, an attorney who represented the interests of pension recipients, with the request that he reply to you.

Yours sincerely,

By Richard W. Vandivier
Bankruptcy Judge

cc: Paul Deignan
BAMBERGER & FEIBLEMAN